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No. 259

Supreme Court of the United States

GEORGE KEMP REAL ESTATE COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition and Brief for Writ of Certiorari.

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THE REPORTER COMPANY, INC., New York City—1950

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

GEORGE KEMP REAL ESTATE COMPANY, a New York corporation existing since 1902, respectfully petitions this Court for writ of certiorari to review the decision on June 7 1950 of the Court of Appeals for the Second Circuit dismissing for lack of jurisdiction our petition to review on a pure question of law a Tax Court decision made on June 2 1949 rejecting our claim under §722 (a) and (b) (5) Internal Revenue Code for refund of $1311.75 excess profits tax paid for the year 1940. That Statute, as amended October 21 1942, provides that where the tax was excessive and discriminatory because the base period (1936-1939) average net income on which the excess profits tax was computed, was less than taxpayer's normal income, then such normal income should be deemed the "constructive" base period average net income and the tax should be recomputed on that constructive base; and a refund should be granted when applied for (as petitioner duly did) in specified ways and times showing the underlying facts. Specifically the Statute (quoted in full in Point IV below) commands in sub (a) that the "constructive" base period net income "*shall*" be used if taxpayer "establishes" the "fair and just" amount thereof based on comparison of normal earnings, and that the prior tax was "excessive

and discriminatory"—without defining the terms "excessive and discriminatory" or prescribing the nature of their proof; and in sub (b) commands that "excessive and discriminatory" *shall* be deemed proved in five particular cases (indicated in Point IV below) by proof of inadequacy of income due to respectively indicated causes. Clearly therefore under sub. (b) a taxpayer on proving inadequacy for the respective cause becomes mandatorily entitled to a finding of excessive and discriminatory tax; and specifically under (b) (5) he becomes so entitled whenever inadequacy results from any factor which can reasonably be considered the cause of inadequacy provided the factor is not inconsistent with any principle of sub. (b) or with the conditions and limitations enumerated therein. If he does not so prove, he has merely failed to obtain benefit of the statutory mandate of sub. (b) but is still entitled to relief under sub. (a) if he can prove an excessive and discriminatory tax in some other way. Our claim was based on both subdivisions (a) and (b) (5).

The Tax Court found on undisputed evidence, mostly stipulated (and no review of the findings was sought or asked by any party), facts entitling petitioner to relief (See Point IV) except for the legal obstacle (as held) that petitioner (contrary to the requirement of (b) (5) that the factors relied on could not be inconsistent with the principles conditions and limitations previously enumerated) failed to prove under sub (b) (3) that petitioner's profit or income cycle was materially different from that of business generally during the period involved (R p. 67 fol. 200, 205-6). As said sub (b) (3) applies solely to "members" of an "industry" engaged in "production," and as petitioner is not a member of an industry nor engaged in production, the question was purely one of law whether said subdivision (b) (3) could apply to petitioner.

The Court of Appeals held that because of Internal Revenue Code §732 (c) it had no jurisdiction to review that question of law for three reasons: (1) §732 (c), forbidding review of Tax Court decisions made on questions arising solely under §722, was not repealed by the 1948 amendment to §1141 (a) I. R. C. because that amendment merely revoked the rule of *Dobson v. Commissioner* 320 U. S. 489 without further effect; (2) §732 (c) prevents review of questions of law as well as fact; and (3) the words "tax liability" in §732 (c) do not mean a tax deficiency but embrace our case where there was never a tax deficiency (nor assertion thereof) and where the "tax liability" had admittedly (by the pleadings) been fully liquidated on time in 1941.

The Tax Court's opinion is reported in 12 T. C. 943. The Court of Appeals' opinion is unreported officially as yet, but is unofficially reported in 463A CCH par. 5959, p. 9712.

The basis of the Supreme Court's jurisdiction is Int. Rev. Code §1141 (a) and Judicial Code §1254 reading as follows respectively:

"* * * and the judgment of any such court" (Court of Appeals) "shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari in the manner provided in §1254 of title 28 of the United States Code."

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *"

The questions presented are whether the 1948 revision of §1141 (a), (c) (1) I. R. C. was repugnant to §732 (c) I. R. C. (or was intended to cover the whole subject matter

of review) thereby repealing the latter; whether, if unrepealed, §732 (c) prevents review of The Tax Court's ruling on the pure question of law whether §722 (b) (3) applies to a non-member of an industry not engaged in production who is merely the owner of two improved properties on Fifth Avenue New York City leased many years ago under long term leases with option in tenant to renew for a century or more; and whether the words "tax liability" in §732 (c) embrace our claim for refund where respondent asserted no claim for deficiency and admittedly no tax liability on our part had existed since 1941 when the 1940 excess profits tax was paid on time in full.

The reasons relied on for allowance of the writ are:

1. That the meaning of important provisions of the Tax Law are here involved, viz. whether the 1948 revision of I. R. C. §1141 is repugnant to I. R. C. §732 (c) (or was intended to cover the whole subject matter of review) whereby the latter was repealed; and whether §732 (c), even if unrepealed, prevents review of a pure question of law under §722, and covers the found facts of our case.

2. The decision below is contrary to *Dowd-Feder v. Commissioner* 173 F. 2d 673, 6th Circuit, in respect to §732 (c) preventing a review of The Tax Court on matter of law under §722; and a conflict therefore exists between different circuits which should be resolved by this Court.

3. The decision below is believed contrary to the reasoning of this Court in *Bingham v. Commissioner* 325 U. S. 365, 369-372 and *U. S. v. American Trucking Assns.* 310 U. S. 534, 544 though neither of those cases was directly concerned with §732 (c).

4. The questions are of great importance intrinsically because there are now pending in The Tax Court 624 abnormality cases under §§721 and 722 including 190 unsettled cases of the 338 new cases filed during the past year

—as your petitioner is informed from inquiries to the Statistical Clerk of the U. S. Tax Court. Petitioner itself has five other filed claims arising out of the same state of facts, four now pending untried in The Tax Court and one pending in the Commissioner's office (Technical Staff), each for refunds under §722 of excess profit taxes paid for the years 1941-1945 far in excess of the tax for the year 1940, all of which must be controlled or affected by the decision below.

5. In August 1949 the Committee of the Judiciary of the House of Representatives by its Law Revision Counsel advised petitioner (or its counsel) "we believe that our action last Congress" (viz revision of §1141 I.R.C.) "has remedied the situation to which you refer" viz. restrictions under §732 (c) to review of Tax Court.

6. In March 1950 identical tax bills (HR 7738 and HR 7825) were introduced in the House of Representatives by Rep. Camp of Georgia (democrat) and Rep. Reed of New York (republican), §196 of which provides as follows:

> "(a) §732 (relating to review of abnormalities) is hereby amended by striking out subsections (c) and (d) and inserting in lieu thereof the following:
>
> '(c) The determinations of any division of the Board of any question arising under §711 (b) (1) (H) (I) (J) or (K), §721, or §722, shall be subject to review by the full Board and by the U. S. Court of Appeals in the same manner as other decisions of the Board under this subchapter.' "

Both bills were at once referred to the Ways and Means Committee but no action thereon has yet been reported—the Committee has been engaged on the excise tax reduction bill reported out of Committee on June 22 1950 (HR 8920 Rev. Bill of 1950) with comprehensive report thereon No. 2319 issued June 23 1950.

7. Said §196 has been approved by the American Bar Association whose Committee on Tax Court Procedure also reported that several individual judges of The Tax Court who had been interviewed about it had no objection to it.

A brief on the jurisdictional question is attached, with some reference to the merits.

WHEREFORE petitoner prays that a writ of certiorari issue to the Court of Appeals Second Circuit to review the decision below.

GEORGE KEMP REAL ESTATE COMPANY,
petitioner

by ALFRED CAMPBELL
president.

(Corporate seal)

State of New York,
County of New York, ss:

ALFRED CAMPBELL being duly sworn says: I am the president of GEORGE KEMP REAL ESTATE COMPANY the petitioner herein; I have read the foregoing Petition for Writ of Certiorari and know the contents thereof and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

ALFRED CAMPBELL

Sworn to before me this
9 day of August 1950.
ELIZABETH B. MURPHY
Notary Public, State of New York
No. 24-8067300
Qualified in Kings County
Cert. filed in Kings County Reg. Off.
Cert. filed in N. Y. Co. Clk's and Reg. Off.
Commission expires March 30, 1952.
(Notarial Seal)

ALEXANDER S. ANDREWS of counsel

BRIEF.

POINT I.

§732(c) was repealed by the 1948 revision of §1141:

§1141(a) as amended effective September 1 1948 (by Public Law 773, 80th Congress, ch. 646, 2d Sess. §36, inserting the words first italicized below) and §1141(c)(1) as reenacted (without change) by the same law, read:

> "(a) Jurisdiction. The courts of appeals shall have exclusive jurisdiction to review the decisions of The Tax Court" (with exception of the Supreme Court, as to exclusiveness) "*in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury;* and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in §1254 of Title 28 of the U. S. Code * * * (c) Powers. (1) To affirm, modify or reverse. Upon such review, such courts shall have power to affirm or, *if the decision of the board is not in accordance with law,* to modify or reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require."

§732(c), as last amended in any respect by Exc. P. Tax Law of 1941 §9, reads:

> "(c) Finality of determination. If in *the determination of the tax liability* under this subchapter the determination of any question is necessary solely by reason of §711 (b) (1) (H), (I), (J), or (K), §721, or §722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board."

The Senate Judiciary Committee in its Report No. 1559 on that amendment to §1141(a) said:

> "Explanation: Section 1294 of H.R. 3214 as it passed the House, relating to appeals from the Tax Court, provided that Tax Court decisions shall be subject to review by the courts of appeals in the same manner and to the same extent as decisions in the district courts in cases tried without a jury. The effect of this language was to repeal the rule laid down in *Dobson v. Comissioner of Internal Revenue* (320 U. S. 489) to the effect that decisions of the Tax Court on questions of fact, including questions of accounting and ultimate conclusions of fact, are not reviewable if supported by any evidence in the record. The effect of section 1294 was to make decisions of the Tax Court on questions of fact reviewable if clearly erroneous, as is now the case with similar decisions of the district courts. In view of the elimination of the Tax Court from the bill and the consequent elimination of section 1294, this amendment to section 1141(a) of the Internal Revenue Code is necessary in order to accomplish the result intended by section 1294."

The 1948 amendment to §1141(a) and the re-enactment (without change) of §1141(c) (1), established a test of jurisdiction on the law depending solely on whether a question had been decided "not in accordance with law," and a test of jurisdiction on the facts depending solely on whether a review could be had if the decision had been by a district court in a non-jury case (a well defined matter, see fed. RCP 52; *Gillette v. Comm.*, F. 2d 505 CCH par. 9348A, 9th Cir. June 14, 1950). Those tests bear no resemblance to the test of §732(c) and are inconsistent if applicable to the same subject matter; also §1141 as revised appears to cover the whole subject of review of the Tax Court:

> "where two legislative acts are repugnant to, or in conflict with, each other, the one last passed,

> being the latest expression of the legislative will, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy. * * *Indeed it has been declared generally in some cases that inconsistency or repugnancy is necessary to effect a repeal by implication; but that statement is incorrect in that it leaves out of consideration the general rule that, even though the two acts are not repugnant, a similar act impliedly repeals an earlier act where it covers the whole subject thereof and plainly shows that it is intended as a substitute thereof." 59 C.J. "Statutes" §514.

The opinion below said nothing at all about sub. (c) (1), but of the 1948 amendment to §1141(a) the opinion said:

> "In our opinion this amendment was not intended to enlarge the appellate jurisdiction originally conferred by §1001 of the Revenue Act of 1926, 44 Stat. 109, so as to give jurisdiction to review decisions expressly made non-reviewable by §732(c). Its purpose was merely to enlarge the scope of existing review so as to do away with the rule of *Dobson v. Commissioner* 320 U. S. 489. That such was the purpose of the amendment was expressly stated by the Senate Judiciary Committee. The Treasury Regulations construing §732 have not been changed because of the 1948 amendment of §1141(a). And the case of *Colonial Amusement Co. v. Commissioner* 3d Cir. 173 F. 2d 568, decided after the amendment, assumed that §732(c) has not been repealed. We hold that it is still operative."

Undoubtedly the amendment was intended to, and did, repeal the Dobson rule, but that wasn't all it did for in addition it, firstly, expressly *gave* ("shall have") exclusive jurisdiction "to review *the* decisions of The Tax Court in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury" without limiting review to "some" decisions of

The Tax Court, or to "certain" decisions of The Tax Court, or to "those decisions of The Tax Court not covered by §732(c)," but to review "the" decisions of The Tax Court, and that means "all" decisions; the more certainly so because in the place appropriate for any intended exception the statute did include an intended exception but in the words "*except as provided in 1254 of title 28 of the United States Code*"—an exception (in favor of the Supreme Court) to the *exclusiveness* of jurisdiction, but not to jurisdiction itself. Secondly, the statute reenacted without change subdivision (c)(1) giving "powers" to modify or reverse "*if the decision of the Board is not in accordance with law*"—which words constitute a grant of power to review all questions of law (*Bingham v Commissioner* 325 U. S. 365, 369-372 *infra* and *U. S. v. American Trucking Associations* 310 U. S. 534, 544 *infra*); and that power was not ousted by §732(c) which, rightly construed (see Point II), pertains only to review of facts.

POINT II.

Neither §732(c) nor the Dobson rule has ever prevented review by the Court of Appeals of questions of law unmixed with questions of fact.

In *Dowd-Feder v. Commissioner* 173 F. 2d 673 (6th, March 28 1949), on motion by the Commissioner to dismiss for lack of jurisdiction because of §732(c), it was held: motion denied; a pure question of law being presented under §722, the decision of the Tax Court was reviewable by the U. S. Court of Appeals.

Under the *Dobson* rule:

Bingham v. Commissioner, 325 U.S. 365, 369-372:

> "Here * * * the questions whether on the facts found the expenses in question are non-deductible

> * * * turn in this case on the meaning of the words of §23(a) (2) 'property held for the production of income.' They are therefore questions of law, decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from the basic findings. * * * They are 'clear-cut' questions of law decision of which by The Tax Court does not foreclose their decision by appellate courts * * *.
>
> "Since our decision in the *Dobson* case we have frequently re-examined, as matters of law, determinations by The Tax Court of the meaning of the words of a statute as applied to facts found by that court. * * * Whether or not its (The Tax Court's) decision is 'in accordance with law' is a question which the statute Internal Revenue Code §1141(c) (1) expressly makes subject to appellate review. * * * If review were to be denied in this case, it would be difficult to say that any construction of a taxing statute by The Tax Court would be subject to appellate review."

In general:

> *U.S. v. Amer. Trucking Assns.* 310 U.S. 534, 544:
>
> "The interpretation of the meaning of statutes as applied to justiciable controversies, is exclusively a judicial function."—The Tax Court being merely an independent agency in the executive branch (§1100 I. R. C.).

The Court of Appeals nevertheless explicitly said that §732(c) forbids review even of a question of law:

> "in the case at bar no disputed question of fact was presented to The Tax Court; its denial of relief under §722 involved only a question of law. The taxpayer contends that §732(c) should not be construed to forbid appellate review of questions of law. But plainly its language forbids any judicial review, whether of fact or law. It was so construed in the two cases already cited. We agree with them. The case of *Dowd-Feder v. Commissioner* 6 Cir. 173 F. 2d 673, relied upon by the petitioner, is not to the contrary, since there the decision of The Tax Court did not depend solely on §722."

Incidentally the learned Court below was mistaken about all of those three cases; for the "two cases" cited in the opinion were *Waters v. Commissioner* 160 F. 2d 596, 597 (9th) c.d. 332 U.S. 767 and *Colonial Amusement Co. v. Commissioner* 173 F. 2d 568 (3d), and in both of those cases review was sought of the facts, not the law: the *Waters* case held that proceeds of life insurance policies on the life of its president, while abnormal under §721, were not attributable to prior years—a question of fact depending on the evidence much of which The Tax Court found "equivocal and inconclusive"; and in the *Colonial Amusment Co.* case The Tax Court found that (1) deduction of $14,703 as officers' salaries accrued and claimed as a deduction in 1935 but not paid until the base period year 1936 were not abnormal in class or amount for 1936 under §711 where taxpayer's books were kept on a cash basis; (2) deduction for the cost of premiums distributed to persons who bought admission tickets and attended taxpayer's moving picture shows, were not abnormal.

The opinion also misconstrued the *Dowd-Feder* case for while that case might have relied on the "solely under §722" clause, actually it did not do so because it found the "solely" question too "close" for reliance (or sole reliance), and instead expressly relied on the "pure question of law" basis ("while the question of our jurisdiction to review the decision of The Tax Court in the instant case is close, we accord due weight to the decision of the 9th Circuit Court of Appeals in the *Stimson Mill Company* case *supra* (163 F. 2d 269), and have reached the conclusion that we should not depart from its rationale, thus stated * * * a pure question of law being presented, it was held that the decision of The Tax Court was reviewable by the Circuit Court of Appeals. The motion of respondent * * * is denied." p. 678.)

There is nothing in §732(c) which requires the holding below and sub (c) (1) of §1141 seems to require the very

opposite: the relief given by §722 depends wholly on facts, and the ban on review thereof should mean review of the existence of those facts entitling to relief—surely not review of nullification by refusing relief where those very facts are found to exist. §732(c) cannot in reason prevent review of the law meaning of §722, for otherwise any construction which the Excess Profits Division (three men see §732(d)) might put upon §722, however repugnant to the words thereof, could not be reviewed at all nor ever be changed except by a later Division ruling; and for a small fraction of an independent agency in the Executive Department (I.R.C. §1100) to have such exclusive power in expounding the law of the land is not warranted by the words of §732(c) and would seem wrong and incomprehensible while Courts of Appeals and the Supreme Court exist.

There is no essential difference between non-reviewability imposed by statute and non-reviewability imposed by the Supreme Court; yet the non-reviewability imposed by this Court in the *Dobson* case never prevented review of pure questions of law as to the meaning of the statute or whether undisputed facts were within or without that statute (*Bingham v. Commissioner* 325 U.S. 365, 369-372 *supra*). No different result for statutory non-reviewability is required or invited by the words of §732(c), and the 1948 reenactment of §1141 sub (c)(1) distinctly repels any such implication.

POINT III.

§732(c) was always by its express terms applicable only to a case for "the determination of tax liability" —which this case is not.

Our case involves no question of "tax liability" but only the very different question of governmental liability for a tax refund on grounds which do not include any claim of original error in the tax. Our case could have embraced a "tax liability" only if the Commissioner had asked, and the Tax Court had upheld or rejected, a deficiency tax, as sub. (*b*) of §732 permitted.

Liability for refund depends on very different grounds from those of a "tax liability" for "refunds and suits on claims therefor proceed on the same equitable principles that underlie an action in assumpsit for money had and received" (*U. S. v. Jefferson Elec. Co.,* 291 U.S. 386, 402).

Our construction accords with judicial definitions of "tax liability" and no reported decision has been found to the contrary. Indeed of the four existing cases each was of a true tax liability within §732(c) viz. *Stimson Mill Co. v. Commissioner,* 163 F. 2d 269 (9th) c.d. 332 U.S. 824, rehearing denied 332 U.S. 839; *Waters v. Commissioner,* 160 F. 2d 596 (9th) c.d. 332 U.S. 767; *Dowd-Feder v. Commissioner* 173 F. 2d 673 (6th); *Colonial Amusement Co. v. Commissioner* 173 F. 2d 568 (3d).

The construction is not inconsistent with Regulation 112 §35.722-3(e) (463A CCH p. 8285) which expressly postulates a true deficiency cross-claim.

Our construction follows the exact words of subdivision (c) and leaves ample scope for effectiveness of its provisions; thus, the double requirement of §732(c) that the

determination must be of a tax liability and must have been necessary solely by reason of §722 (or one of the other sections mentioned), involves no repugnancy in requirements: for, as to §722, a taxpayer might in recomputing his base period average net income, have overlooked or suppressed additional income making the base period income exceed the normal income—in which case both requirements would be satisfied and a "tax liability" would exist for which the Commissioner could have a deficiency judgment under §732(b).

Incidentally, if repugnancy could exist, there would be no justification for disregarding the tax liability requirement in favor of the other, since, first, "to justify departure from the letter of an Act of Congress as leading to absurd results, the absurdity must be so gross as to shock the general moral or common sense; there must be something to make plain the intent of Congress that the letter shall not prevail; it is not enough merely that hard and objectionable or absurd consequences, which probably were not in the contemplation of the framers, are produced by the act of legislation * * * and especially so with regard to a taxing act where the general rule requiring adherence to the letter applies with peculiar strictness" (*Crooks v. Harrelson* 282 U.S. 55, 60-61; cf. *U. S. v. Amer. Trucking Assns.* 310 U.S. 534, 543-44); and, second, we defy anybody to show that it would shock the moral sense or be a hard consequence that the Court of Appeals should have jurisdiction to review an independent agency in the executive branch of the government on this question of tax law when every other question of tax law is reviewable.

In overruling our contentions on this matter the opinion below said:

> "Finally, the taxpayer argues that section 732(c) is inapplicable because the determination of the Tax Court was not of the petitioner's "tax liability" but of its right to a refund; in other words, that the prohibition of review applies only in a case in which a deficiency in tax was determined. This is answered by the legislative history of section 732(c). The committee report recognizes that a claim for refund will be the normal procedure for seeking relief under several of the sections mentioned in section 732(c) and states the intention to apply said section to such cases. Indeed, section 732(a) makes clear that the Commissioner's notice of disallowance of a claim for refund "shall be deemed to be a notice of deficiency" if the taxpayer petitions the Tax Court for a redetermination of the tax."

But §732(a) is merely that if the Commissioner disallows a claim for refund under §722 he must give notice thereof and "such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayment." The Committee Report thereon (C.B. 1941-1 p. 560-561) states:

> "§9 of the Bill (adding §732 to the Excess Profits Tax Act of 1940) extends to the Board exclusive jurisdiction to review the Commissioner's decision upon any question the determination of which is necessary solely by reason of §* * *722. * * * Under existing law, unless a deficiency has been determined by the Commissioner, a taxpayer has no right of appeal to the Board * * *. Inasmuch as the taxpayer's right to relief under certain of the relief provisions provided in this Bill may only be raised by a claim for refund, it is necessary that a procedure be provided whereby the Board may obtain jurisdiction to review a decision of the Commissioner disallowing such claims. * * *"

Thus the extended definition of "notice of deficiency" in subdivision (a) was wholly for taxpayer's benefit in order to furnish him a procedure, otherwise lacking, to get into The Tax Court.

Yet what was merely taxpayer's shield against his own exclusion from The Tax Court viz. a new definition of "notice of deficiency," the opinion uses to define or construe the different words "tax liability" used in subdivision (c), whereas in fact the antecedent reference to "tax liability" is not in subdivision (a) but in subdivision (b) which provides that if The Tax Court denies the refund and also finds there is a deficiency for such year, then the Board shall have jurisdiction to determine and assess the amount of that deficiency despite (as explained by the Committee Report) its outlawry by the Statute of Limitations. That would be a true deficiency and a true tax liability, and (with subdivision (c)) is the only reference to "tax liability" in the entire Statute; and, we submit, the tax liability thus created or recognized by sub. (b) is the one referred to in the succeeding subdivision (c)—rather than a refund liability (or non-liability) having no resemblance to a tax liability except in reviewability by the Tax Court despite absence of a technical deficiency.

In short the maximum result of §732(a) is merely that the notice of disallowance is to be deemed a notice of deficiency—not at all that such notice of artificial deficiency will (regardless of the fact) constitute a "determination of tax liability" as used in §732(c), for no "tax liability" can conceivably arise unless the redetermination results in an increase over the paid amount plus any allowed refund or credit—in which latter case the deficiency would not be artificial but real and the extended definition would have been useless except for getting into The Tax Court (which was its exact and sole func-

tion), and certainly not a synonym for "tax liability" on a later occasion unconnected with admission into The Tax Court.

In conclusion: Had §732(c) omitted the words "in the determination of the tax liability" and substituted therefor the words "in any determination," then no review on the facts would lie as to any such question arising solely under §722 so long as §732(c) remained operative; but review would still lie on the law.

Sub. Sections (a) & (b) of §732 are as follows:

> §732(a) Petition to the Board—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b)(1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.
>
> (b) Deficiency found by Board in case of claim—If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

POINT IV.

On the merits.

The Statutes and Regulations:

§722. (a) General Rule—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *

(b) Taxpayers Using Average Earnings Method.—The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) * * *(immaterial—production output or operation interrupted or diminished because of unusual and peculiar events.)

(2) * * *(immaterial—taxpayer's business depressed in base period by temporary economic circumstances unusual for taxpayer or unusual for industry of which he was a member.)

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to (A) a profits cycle differing materially in length and amplitude from the general business

cycle, or (B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period.

(4) * * *(immaterial—taxpayer during or immediately prior to base period commenced or changed business or its character, and the average base period net income does not reflect normal operation for entire base period etc.)

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.

Regulation 112 §35.722-2(b) (8) (set out in CCH 463A par. 5142B p. 8253), defining "industry" for the purpose of §722 and the pertinent regulations:

> "* * * In general an industry may be said to include a *group of enterprises* engaged in *producing* or *marketing* the same or similar *products* or *services* under analogous conditions which are essentially different from those encountered by other enterprises * * *"

Factors proved:

The factors proved by petitioner and found by The Tax Court (R. pp. 61-67, 16-22) were that petitioner's income is principally from rentals of the property known as Saks-Fifth Avenue on the east side of Fifth Avenue from 49th to 50th Streets New York City; which property was in 1920 rented to Saks & Co. one of the wholly-owned subsidiaries of Gimbel Brothers Inc. which owns and operates through itself or subsidiaries seven or eight large stores throughout the U. S. including two others in New York City; in 1920 the whole block front to a depth of 200 and 208 ft. belonged to petitioner except an interior rectangle 42′ x 100′ fronting

on Fifth Avenue known as No. 617 5th Ave owned by a Gimbel subsidiary; the lease ran till 1943 with option in tenant to renew for 21 year terms for a century or more, at a net rental (on and after May 1 1924) of $300,000 per year payable quarterly in advance; the tenant thereupon at its own expense erected a new unit building of 11 stories and basement and subbasement, on petitioner's property and its own said rectangular lot, and since 1923 has there carried on its business of a department store under the name Saks-Fifth Avenue; in 1934 or early in 1935 tenant and its parent company resumed with petitioner efforts to induce petitioner to reduce the rental for 4½ years and to purchase for a million dollars all cash the said interior lot owned by tenant or its parent company in order to save tenant and its parent from threatened bankruptcy due to its losses and drop in sales during the depression; said representations were that it had suffered severe losses of approximately $8,000,000 and severe decrease in business from $24,000,000 to $12,000,000 whereby its resources had been so impaired that it had been compelled to seek and had procured temporarily concessions from creditors and landlords other than petitioner and that the continuance of such concessions was essential for the continuance in business of said tenant and its parent and other affiliates but said concessions would not be continued by the $44,000,000 creditors unless petitioner would also participate therein to the extent requested, and that unless granted by petitioner all tenant's existing arrangements with other landlords and creditors would collapse whereby bankruptcy reorganization would probably result leaving petitioner with a U-shaped building and no tenant but with continuing expenses of taxes to the City of New York aggregating between $250,000 and $300,000 yearly and mortgage interest of $70,000 yearly, and the necessity of undertaking a major building operation of new walls from subbasement to penthouse on three sides in order to separate petitioner's property from the other property, a construction operation entailing great expense and many months'

work during which petitioner's own property would be largely untenantable; and thereafter to find another tenant for a building adapted to a single type of business with peculiar and inconvenient shape by reason of the excision of 4200 sq. ft. from the middle of the principal frontage on Fifth Avenue. The Tax Court found that said representations were true and that petitioner acted on the basis thereof and for 4½ years until July 1 1940 modified the lease by reducing the rental $50,000 per year; and at the same time petitioner bought for $1,000,000 in cash tenant's said property formerly known as 617 Fifth Avenue and rented same back to the same tenant for the same term of years and under the same provisions except that the yearly rent was $55,000 per year (equalling $13.09 per square foot per year—whereas the reserved rate of the old lease was $8.15 per square foot per year and during the reduction was $6.79 per square foot per year, all as found by The Tax Court or mathematically resulting therefrom).

On July 1 1940 the rent under the lease of 1920 reverted to the reserved rent, which has been paid in full ever since.

August 1950.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 259

GEORGE KEMP REAL ESTATE COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 60-70) is reported at 12 T. C. 943. The opinion of the Court of Appeals (R. 103-106) is reported at 182 F. 2d 847.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1950. (R. 106-107.) The petition for a writ of certiorari was filed August 22, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether Section 732(c) of the Internal Revenue Code deprived the Court of Appeals of jurisdiction to review the decision of the Tax Court in this proceeding on a question arising solely under Section 722 of the Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts in this case, as found by the Tax Court (R. 61-66) upon the basis of a stipulation between the parties (R. 16-22) and certain testimony and exhibits [1] adduced before the Tax Court (R. 26-58), may be summarized as follows:

Taxpayer, organized in 1902, since approximately 1903 derived its income mainly from rentals of property owned by it, comprising, except for a strip of 42-foot frontage, an entire block fronting on Fifth Avenue, between 49th and 50th Streets, New York City. (R. 61.) In 1920, it leased that property to Saks & Company, at a net rental, payable quarterly, of $200,000 a year from October 1, 1922, to May 1, 1924, and of $300,000 a year thereafter. The lease was for 21 years, expiring October 1, 1943, with several renewal periods of 21 years each, at the election of the lessee. The lessee, pursuant to the lease, in 1922 completed the construc-

[1] Pursuant to order of the court below (R. 84-85), the exhibits were transmitted to it in their original form.

tion of a unified building on the taxpayer's property and on the 42-foot strip not owned by the taxpayer. (R. 61-62.)

The lessee, Saks & Company, is a corporation whose stock is 100 percent owned by Gimbel Brothers, Inc., which also owns several department stores in New York and other cities. During the general business depression following 1931 the Gimbel Group, including Saks & Company, suffered severe financial reverses. Heavy fixed charges, particularly rent and mortgage interest, were too high and had to be scaled down beginning in 1932, and by 1935 the Gimbel group was kept in business only by the concessions made by its lessors and mortgagees, all of whom agreed to reductions during the depression. The taxpayer made concessions in rental of $25,000 in 1932, $100,000 in 1933, $75,000 in 1934, and $50,000 in 1935. (R. 61-63.)

Upon representations by the Gimbel group of a danger of collapse unless the taxpayer agreed to a long-term concession in rent and bought the 42-foot strip, the taxpayer in December 1935 entered into an agreement whereby among other things, it agreed to reduce the rent by $50,000 a year between December 1, 1935, and June 30, 1940, and bought the 42-foot strip from the Gimbel group. (R. 63-65.)

Reductions in rent during the depression were not unusual; such reductions were quite frequent in respect of comparable properties. Every other

lessor of the Gimbel group reduced its rent. (R. 64.)

The taxpayer's return for the year 1940 disclosed an excess profits net income of $172,313.28. Its excess profits credit, based upon its average base period net income of $170,596.08, was $162,066.28.[2] Its excess profits tax for 1940 was $1,311.75. (R. 65.)

The taxpayer filed an application for relief under Section 722 of the Internal Revenue Code, claiming a refund of excess profits tax in the amount of $1,311.75 for the year 1940. (R. 60.) It sought to increase its average base period net income by $50,000 so as to give it a constructive average base period net income of $220,596.08—and if its request for relief had been granted it would have had to pay no excess profits tax for 1940. (R. 65.)

The Commissioner disallowed the taxpayer's application for relief under Section 722 (R. 60), and, in the statement attached to the statutory notice under Section 732 (R. 91-93), specifically advised the taxpayer of his reasons for the disallowance (R. 65-66, 92-93).

On the taxpayer's appeal to the Tax Court (R. 3-13), the Tax Court held that the taxpayer was not entitled to any relief under Section 722 for the year 1940 (R. 60-70, 71).

---

[2] In the Tax Court's opinion (R. 65) $170,596.08 is erroneously used as the amount of taxpayer's excess profits credit. Actually, that figure was the amount of the taxpayer's base period average net income, and, under Section 713 of the Code, its credit was 95 percent of that, or $162,066.28. (See R. 93.)

The taxpayer sought a review of the Tax Court's decision by the court below (R. 74-80), but the court below, upon motion by the Commissioner (R. 94-95), dismissed for lack of jurisdiction the taxpayer's petition for review (R. 103-107).

ARGUMENT

1. Section 732(c) of the Internal Revenue Code (Appendix, *infra*) expressly and unqualifiedly prohibits any review by any court or agency other than the Tax Court of a determination of any question arising "solely by reason of * * * section 722 * * * " of the Code. Accordingly, the Court below correctly dismissed for lack of jurisdiction the taxpayer's petition for review of the decision of the Tax Court. (R. 103-106.)

The only issue raised and presented to the Tax Court for decision was as to the correctness of the Commissioner's disallowance of the taxpayer's application for relief under Section 722. (R. 3-13, 60-61, 65-66.) Upon a hearing, on the merits, the Tax Court concluded upon the facts that the taxpayer was not entitled to any relief under Section 722. (R. 60-70, 71.) Appellate review of the Tax Court's decision, which was on a question turning solely upon Section 722, is clearly prohibited by Section 732(c) of the Code.

2. Sections 722 and 732 of the Code are part of the new subchapter (SUBCHAPTER E — EXCESS PROFITS TAX) which was added to the Code by Section 201 of the Second Revenue Act of 1940, c. 757,

54 Stat. 974, entitled "Excess Profits Tax Act of 1940", applicable to taxable years beginning after December 31, 1939, and repealed as to taxable years beginning after December 31, 1945, by Section 122(a) of the Revenue Act of 1945, c. 453, 59 Stat. 556. Under the excess profits tax law, relief for "abnormalities" is accorded primarily by Section 721, which grants relief with respect to "abnormalities" in income in the taxable year (see *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C.A. 9th), certiorari denied, 332 U. S. 767), and by Section 722, which grants relief with respect to "abnormalities" in the base period (see *American Coast Line* v. *Commissioner,* 159 F. 2d 665 (C.A. 2d), and *Pohatcong Hosiery Mills* v. *Commissioner,* 162 F. 2d 146 (C.A. 3d)), while some further relief with respect to certain abnormal deductions is provided under Section 711(b) (1) (H), (I), (J) and (K). See Section 732(a) of the Internal Revenue Code (Appendix, *infra*) and Section 30.732-1 of Treasury Regulations 109, as amended (Appendix, *infra*). Both of the principal "abnormalities" sections, 721 and 722, were originally added to the Code by the Second Revenue Act of 1940, and were later amplified by the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by the Revenue Act of 1942, c. 619, 56 Stat. 798.[3]

[3] Section 722 was further amended with respect to its *procedural* provisions—as distinguished from its *relief* provisions—by the Act of December 17, 1943, as shown in the footnotes which accompany the portions of Section 722 quoted in the Appendix.

At the same time that Congress amplified the provisions of the two principal "abnormalities" sections in the Excess Profits Tax Amendments of 1941, it also, by Section 9 thereof, added to the Code Section 732(a), (b) and (c) to deal specifically with the review of questions of "abnormalities" by the Board of Tax Appeals (now called The Tax Court of the United States). By subsection (a) of Section 732, Congress provided for the review by the Tax Court of the disallowance by the Commissioner of a claim for refund upon the basis of the "abnormalities" provisions of the law, namely, parts of Section 711(b), and Section 721 and Section 722. By subsection (c) of Section 732, Congress limited the review of those "abnormalities" questions to the Tax Court, expressly prohibiting any further review by any other court or agency of the decision of the Tax Court on any of those "abnormalities" questions. The intent of Congress to so limit the review of "abnormalities" questions is made unmistakably clear by its Committee Reports. H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14-15 (1941-1 Cum. Bull. 550, 560-561), and S. Rep. No. 75, 77th Cong., 1st Sess., pp. 15-16 (1941-1 Cum. Bull. 564). Subsequently, by Section 222(c) of the Revenue Act of 1942, Congress added subsection (d) to Section 732 of the Code to provide for the review by a "special division" of not less than three judges of the Tax Court of the decisions by any division of the Tax Court involving questions

under Section 721(a) (2) (C) or Section 722 of the Code. This new feature was written into the law by Congress because of its realization of the "complicated nature" of the problems and issues involved. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 149 (1942-2 Cum. Bull. 372, 482); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 206-207 (1942-2 Cum. Bull. 504, 655). In the new subsection (d) of Section 732, Congress further provided that the decisions on questions under Section 721(a)(2)(C) or Section 722 by the newly created special division of the Tax Court shall be the decisions of the Tax Court and shall not be reviewable by the entire Tax Court.[4] In accordance with Section 732(d), the decision of the division of the Tax Court in this proceeding was reviewed by the special division. (R. 70.)

3. The decision of the court below is in keeping with the decisions of two other Courts of Appeals which, properly observing the prohibition contained in Section 732, have declined to review decisions of the Tax Court turning, in one case, on a question arising solely under Section 721 of the Code (*James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596 (C.A. 9th), certiorari denied, 332 U. S. 767), and in another case, on a question arising solely under Section 711(b) (1) (J) and (K) (*Colonial Amusement Co. of Philadelphia* v. *Commissioner,* 173 F. 2d 568 (C.A. 3d)).

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[4] Nor, of course, are decisions of such questions by the special division reviewable by any other court or agency, in view of the provisions of Section 732(c) of the Code.

4. While the taxpayer has not questioned it, the constitutionality of Section 732 could not be successfully attacked. It was expressly upheld in the *Waters* case, with respect to the attempted review of a question arising under Section 721, and, since Section 722, like Section 721, is a relief provision (*American Coast Line* v. *Commissioner,* 159 F. 2d 665 (C.A. 2d), and *Pohatcong Hosiery Mills* v. *Commissioner,* 162 F. 2d 146 (C.A. 3d)), the same conclusion as was reached in the *Waters* case is required as to the validity of Section 732(c) with respect to Section 722 questions.

Congress unquestionably had the power to limit to the Tax Court the review of the Commissioner's action on "abnormal questions", and thus take away, with respect to such questions, the further review by the appellate courts normally available with respect to decisions of the Tax Court. It is settled that, even with respect to this Court, Congress has the power to limit or withdraw its appellate jurisdiction. See *Ex parte McCardle,* 7 Wall. 506, 512-514; also *Daniels* v. *Railroad Co.,* 3 Wall. 250, 254; *Railroad Co.* v. *Grant,* 98 U. S. 398, 401-403; *Missouri* v. *Missouri Pac. Ry. Co.,* 292 U. S. 13, 15-16. Of course, the same principle applies with even greater force to the lower federal courts, which are the creatures of Congress (see *Kline* v. *Burke Constr. Co.,* 260 U. S. 226, 233-234; *Lockerty* v. *Phillips,* 319 U. S. 182, 187), and with still greater force with respect to administrative agencies created by Congress (see *Gordon* v. *United*

States, 7 Wall. 188, 195; and *Lynch* v. *United States,* 292 U. S. 571, 582).

5. The court below correctly rejected (R. 104-105) the taxpayer's contention, repeated here (Pet. 4, Br. 7-10), to the effect that Section 732(c) of the Code was repealed by the amendment to Section 1141(a) made by Section 36 of the Act of June 25, 1948, c. 646, 62 Stat. 869 (26 U.S.C. 1946 ed., Supp. II, Sec. 1141), which gave the appellate courts the power to review Tax Court decisions to the same extent as decisions of District Courts in nonjury cases. The effect of that amendment, as pointed out by the court below (R. 104), was merely to repeal the rule of *Dobson* v. *Commissioner,* 320 U. S. 489. That only enlarged the *scope* of appellate review in those cases where the decision of the Tax Court was reviewable.

6. Likewise, the court below properly rejected (R. 105) the contention of the taxpayer, also repeated here (Pet. 4, Br. 10-13), that Section 732(c) does not prevent review of questions of law by appellate courts. The language of Section 732(c) plainly prohibits the review of *any* question arising solely under Section 722. Thus, the decision below is clearly not in conflict, as claimed (Pet. 4, Br. 10-11, 12), with cases such as *Bingham* v. *Commissioner,* 325 U. S. 365, and *United States* v. *Amer. Trucking Ass'ns,* 310 U. S. 534, relative to the subjects of questions of law and interpretation of statutes, nor with *Dowd-Feder, Inc.* v. *Com-*

missioner, 173 F. 2d 673 (C.A. 6th). In *Dowd-Feder, Inc.,* the decision of the Tax Court was held to be reviewable because viewed as involving a question turning not solely on Section 722. The same is true of *Stimson Mill Co.* v. *Commissioner,* 163 F. 2d 269 (C.A. 9th), certiorari denied, 332 U. S. 824, rehearing denied, 332 U. S. 839.

7. The court below also correctly rejected (R. 105-106) the argument of the taxpayer, repeated here (Br. 14-18), that the prohibition against appellate review by Section 732(c) is not applicable to this proceeding because this is not a case in which a "deficiency" in tax was determined. That contention rests upon the wholly erroneous premise that the phrase "determination of the tax liability under this subchapter" in Section 732(c) means a determination of a *deficiency* in excess profits tax, and that therefore the prohibition of Section 732(c) applies only in "deficiency" cases. The phrase "the determination of the tax liability under this subchapter" plainly relates to the determination of the correct amount of excess profits tax due. That Section 732(c) is not restricted to cases where a "deficiency" is determined is further demonstrated by Section 732(a), which provides that if a *refund* of excess profits tax under Section 722 is denied, the taxpayer may file a petition with the Tax Court "for a redetermination of the tax under this subchapter". See also H. Rep. No. 146, 77th Cong., 1st Sess., pp. 14-15 (1941-1 Cum. Bull. 550, 560-561).

CONCLUSION

The decision below is correct. There is no conflict of decisions, and no question calling for review by this Court is presented. The petition should be denied.

Respectfully submitted,

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SEPTEMBER 1950.

APPENDIX

Internal Revenue Code:

CHAPTER 1—INCOME TAX

* * * * *

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"]

SEC. 722. GENERAL RELIEF — CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) *General Rule.*—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * *

(b) *Taxpayers Using Average Earnings Method.*—The tax computed under this sub-

chapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) in one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) the business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry,

(3) the business of the taxpayer was depressed in the base period by reason of conditions generally prevailing in an industry of which the taxpayer was a member, subjecting such taxpayer to

(A) a profits cycle differing materially in length and amplitude from the general business cycle, or

(B) sporadic and intermittent periods of high production and profits, and such periods are inadequately represented in the base period,

(4) the taxpayer, either during or immediately prior to the base period, commenced business or changed the character of the business and the average base period net income does not reflect the normal operation for the entire base period of the business. If the business of the taxpayer did not reach, by the end of the base period, the earning level which it would have reached if the taxpayer had commenced business or made the change in the character of the business two years before it did do, it shall be deemed to have commenced the business or made the change at such earlier time. For the purposes of this subparagraph, the term "change in the character of the business" includes a change in the operation or management of the business, a difference in the products or services furnished, a difference in the capacity for production or operation, a difference in the ratio of nonborrowed capital to total capital, and the acquisition before January 1, 1940, of all or part of the assets of a competitor, with the result that the competition of such competitor was eliminated or diminished. Any change in the capacity for production or operation of the business consummated during any taxable year ending after December 31, 1939, as a result of a course of action to which the taxpayer was committed prior to January 1, 1940, or any acquisition before May 31, 1941, from a competitor engaged in the dissemination of information through the public press, of substantially all the assets of such com-

petitor employed in such business with the result that competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated, shall be deemed to be a change on December 31, 1939, in the character of the business, or

(5) of any other factor affecting the taxpayer's business which may reasonably be considered as resulting in an inadequate standard of normal earnings during the base period and the application of this section to the taxpayer would not be inconsistent with the principles underlying the provisions of this subsection, and with the conditions and limitations enumerated therein.[5]

* * * * *

(d) *Application for Relief Under This Section.*—The taxpayer shall compute its tax, file its return, and pay the tax shown on its

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[5] The quoted portions of Section 722(a) and (b) are as amended by Section 222(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and by Section 222(e)(1) of that Act given retroactive application with respect to taxable years beginning after December 31, 1939. As originally added to the Code by Section 201 of the Second Revenue Act of 1940, Section 722 was entitled "Adjustment of Abnormalities in Income and Capital by the Commissioner." Section 722 was amended by Section 6 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, at which time the title of Section 722 was changed to "Adjustment of Abnormal Base Period Net Income." The provisions for relief under Section 722 were again, and finally, amended by Section 222(a) of the Revenue Act of 1942, at which time the title of the section was changed to read as quoted above. The subsequent amendment of Section 722, which was made by the Act of December 17, 1943, c. 346, 57 Stat. 601, Section 1, related only to provisions concerning the method or procedure of making application for relief under Section 722, as pointed out in the next footnote herein, after Section 722(d).

return under this subchapter without the application of this section, except as provided in section 710(a)(5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.[6]

(26 U.S.C. 1946 ed., Sec. 722.)

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[6] The provisions governing the method or procedure for applying for relief under Section 722 were first introduced as Section 722(e) by the amendment of Section 722 made by Section 6 of the Excess Profits Tax Amendments of 1941. Those provisions relative to the procedure for the "Application for Relief" under Section 722 were amended by Section 222 of the Revenue Act of 1942, at which time they became subsection "(d)" of Section 722, and as subsection "(d)" they were again amended by the Act of December 17, 1943, at which time they were amended to read as quoted above. The latter Act expressly provides that the amendments thereby made to Section 722(d) shall be applicable with respect to taxable years beginning after December 31, 1939.

SEC. 732 [as added by Section 9 of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17] REVIEW OF ABNORMALITIES BY BOARD OF TAX APPEALS.[7]

(a) *Petition to the Board.*—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) [8] the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by Board in Case of Claim.*—If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for re-

[7] The name was changed to The Tax Court of the United States by Section 504 of the Revenue Act of 1942.

[8] By Section 203(a) of an Act of December 29, 1945, c. 652, 59 Stat. 669, the language in the parentheses was changed so as to read "(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day)," and by Section 203(b) of that Act the change was made effective as of September 8, 1945.

fund described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.[9]

(d) [as added by Section 222(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Review by Special Division of Board.*—The determinations and redeterminations by any division of the Board involving any question arising under section 721(a)(2)(C) or section 722 shall be reviewed by a special division of the Board which shall be constituted by the Chairman and consist of not less than three members of the Board.[10] The decisions of such special

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[9] By Section 17 of the Excess Profits Tax Amendments of 1941, the amendments made by that Act in adding to the Code Section 732 (a), (b) and (c) were made effective as of the date of the enactment of the Excess Profits Tax Act of 1940, as already pointed out.

[10] By Section 2 of the Act of June 30, 1945, c. 211, 59 Stat. 295, Section 732(d) was amended so as to add the words "with respect to any taxable year" after the words "section 722." This change was to correct "a technical error in section 222 of the Revenue Act of 1942 * * *. The effect of the amend-

division shall not be reviewable by the Board, and shall be deemed decisions of the Board.

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(26 U.S.C. 1946 ed., Sec. 732.)

Treasury Regulations 109, promulgated under the Internal Revenue Code:

SEC. 30.732-1 [as added by T. D. 5045, 1941-1 Cum. Bull. 69, and as amended by T. D. 5264, 1943 Cum. Bull. 761, and T. D. 5474, 1945 Cum. Bull. 280]. *Review of Abnormalities by the Tax Court of the United States.*—Section 732 provides that, in addition to its jurisdiction to redetermine a deficiency, The Tax Court of the United States shall have jurisdiction to review the Commissioner's disallowance of a claim for refund of excess profits taxes, if such disallowance involves the determination of any question relating solely to the application of section 711(b)(1)(H), (I), (J), or (K), relating to abnormal deductions during the base period, section 721, relating to abnormalities in income in the taxable period, or section 722, relating to general relief from excessive and discriminatory excess profits taxes. The taxpayer's petition must be filed with The Tax Court within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) after the sending by registered mail of the notice of disallowance of the claim for refund.

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ment is that the review provision will apply to all taxable years beginning after December 31, 1939." S. Rep. No. 399, 79th Cong., 1st Sess., pp. 1-2.

Where the taxpayer has filed such a petition the notice of disallowance of its claim for refund is considered to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments. If The Tax Court finds that there has been no overpayment of tax with respect to the taxable year involved, and further finds that there is a deficiency for such year, The Tax Court will determine the amount of such deficiency and such amount shall, when the decision of The Tax Court becomes final, be assessed and paid upon notice and demand from the collector.

The extent and the finality of The Tax Court's jurisdiction with respect to questions involving the sections dealing with abnormalities and general excess profits tax relief are set forth in section 732(c) and (d). If the ascertainment of the excess profits tax liability for a taxable year is dependent in whole or in part upon the determination of any question which is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except The Tax Court. If the determinations and redeterminations by any division of The Tax Court involve any question arising under section 721(a)(2)(C) or section 722 with respect to any taxable year, such determinations and redeterminations shall be reviewed by a special division of The Tax Court which shall be constituted by the Presiding Judge and shall consist of not less than

three judges of The Tax Court. The decisions of such special division shall not be reviewable by The Tax Court, or by any court or agency, and shall be deemed decisions of The Tax Court. The application of section 732(c) and (d) may be shown by the following example:

Example.—A taxpayer, which is a domestic manufacturing corporation, has filed a claim for refund for a taxable year beginning in 1941, and as a result of the Commissioner's action with respect to such claim, makes the following contentions: first, that it is entitled to a constructive average base period net income of $1,300,000 pursuant to an application filed on Form 991 for relief under section 722 instead of a constructive average base period net income of $900,000 determined by the Commissioner; second, that $100,000 of income from a judgment based upon a claim for patent infringement is net abnormal income attributable under section 721 to prior years whereas the Commissioner has attributed only $60,000 to such years; and third, that the amount of gross income determined by the Commissioner is too large. Since the taxpayer's first contention is predicated upon an issue arising under section 722, the Commissioner's determination is reviewable only by The Tax Court, and any determination or redetermination made by any division of The Tax Court must be reviewed by the special division constituted by the presiding judge; the decision of such special division is the decision of The Tax Court and cannot be reviewed by The Tax Court or any court or

agency. The taxpayer's second contention is based upon an issue arising under section 721; therefore the Commissioner's determination is reviewable only by The Tax Court. Since the issue arises under section 721(a)(2)(A), and not section 721(a)(2)(C), no further review is required by the special division, and the decision of The Tax Court is final and cannot be reviewed by any court or agency. The taxpayer's third contention does not arise under either section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, but independently of such sections. Consequently review of this issue is not confined to The Tax Court.

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